CRAVATH, SWAINE & MOORE LLP

WORLDWIDE PLAZA
825 EIGHTH AVENUE
NEW YORK, NY 10019-7475

TELEPHONE: (212) 474-1000
FACSIMILE: (212) 474-3700

CITYPOINT
ONE ROPEMAKER STREET
LONDON EC2Y 9HR
TELEPHONE: 44-20-7453-1000
FACSIMILE: 44-20-7860-1150

WRITER'S DIRECT DIAL NUMBER

(212) 474-1422

ALLEN FINKELSON
RONALD S. ROLFE
MAX R. SHULMAN
STUART W. GOLD
JOHN W. WHITE
JOHN E. BEERBOWER
EVAN R. CHESLER
MICHAEL L. SCHLER
RICHARD LEVIN
KRIS F. HEINZELMAN
B. ROBBINS KIESSLING
ROGER D. TURNER
PHILIP A. GELSTON
RORY O. MILLSON
RICHARD W. CLARY
WILLIAM P. ROGERS, JR.
JAMES D. COOPER
STEPHEN L. GORDON
DANIEL L. MOSLEY
GREGORY M. SHAW
PETER S. WILSON
JAMES C. VARDELL, III
ROBERT H. BARON
KEVIN J. GREHAN

STEPHEN S. MADSEN
C. ALLEN PARKER
MARC S. ROSENBERG
SUSAN WEBSTER
DAVID MERCADO
ROWAN D. WILSON
PETER T. BARBUR
SANDRA C. GOLDSTEIN
THOMAS G. RAFFERTY
MICHAEL S. GOLDMAN
RICHARD HALL
ELIZABETH L. GRAYER
JULIE A. NORTH
ANDREW W. NEEDHAM
STEPHEN L. BURNS
KATHERINE B. FORREST
KEITH R. HUMMEL
DANIEL SLIFKIN
JEFFREY A. SMITH
ROBERT I. TOWNSEND, III
WILLIAM J. WHELAN, III
SCOTT A. BARSHAY
PHILIP J. BOECKMAN
ROGER G. BROOKS

WILLIAM V. FOGG
FAIZA J. SAEED
RICHARD J. STARK
THOMAS E. DUNN
MARK I. GREENE
SARKIS JEBEJIAN
JAMES C. WOOLERY
DAVID R. MARRIOTT
MICHAEL A. PASKIN
ANDREW J. PITTS
MICHAEL T. REYNOLDS
ANTONY L. RYAN
GEORGE E. ZOBITZ
GEORGE A. STEPHANAKIS
DARIN P. MCATEE
GARY A. BORNSTEIN
TIMOTHY G. CAMERON
KARIN A. DEMASI
LIZABETHANN R. EISEN
DAVID S. FINKELSTEIN
DAVID GREENWALD
RACHEL G. SKAISTIS
PAUL H. ZUMBRO
JOEL F. HEROLD

ERIC W. HILFERS
GEORGE F. SCHOEN
ERIK R. TAVZEL
CRAIG F. ARCELLA
TEENA-ANN V. SANKOORIKAL
ANDREW R. THOMPSON
DAMIEN R. ZOUBEK
LAUREN ANGELILLI
TATIANA LAPUSHCHIK
ERIC L. SCHIELE
ALYSSA K. CAPLES
JENNIFER S. CONWAY
MINH VAN NGO

SPECIAL COUNSEL
SAMUEL C. BUTLER
GEORGE J. GILLESPIE, III

OF COUNSEL
PAUL C. SAUNDERS

October 14, 2010

In re Merck & Co., Inc., Securities, Derivative & "ERISA" Litigation (MDL 1658)
Nos. 05-CV-01151-SRC-MAS & 05-CV-02367-SRC-MAS
The Consolidated Securities Action

Dear Judge Chesler:

Defendants other than Dr. Scolnick respectfully submit this letter in response to Plaintiffs' October 5, 2010 letter submitted in connection with the parties' motion to dismiss briefing in the above-referenced action.

In their letter, Plaintiffs bring to this Court's attention *Schleicher v. Wendt*, No. 09-2154, 2010 U.S. App. LEXIS 17367 (7th Cir. Aug. 20, 2010), which Plaintiffs claim stands for the proposition that, in the Seventh Circuit, loss causation need not be proven for class certification. Respectfully, *Schleicher* has no relevance to the issues before this Court on Defendants' motion to dismiss.

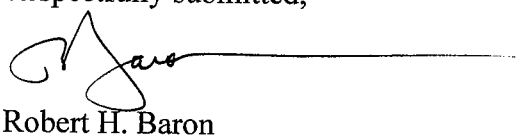
First, whether Federal Rule of Civil Procedure 23 requires proof of loss causation has no bearing whatsoever on Defendants' motion to dismiss. As set forth in Defendants' opening and reply briefs, failure to plead loss causation may result in dismissal—and should here—because Plaintiffs do not (and cannot) allege that the losses incurred in October 2003 and September 2004 were caused by the revelation of Defendants' allegedly falsely held opinions. (*See* Mem. at 25-30; Reply Mem. at 8-19.) *Schleicher*, by contrast, stands merely for the proposition that, in the context of class certification, determinations of loss causation "can be made on a class-wide basis, because [they] affect[] investors in common". 2010 U.S. App. LEXIS 17367, at *19.

Second, nothing in *Schleicher* (or any other case cited by Plaintiffs) undermines the principle, recognized by the Fifth Circuit and Supreme Court, that loss causation and reliance are inextricably intertwined. *See Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 663 (5th Cir. 2004) ("Reliance is an indispensable element of any fraud claim because it provides the 'causal connection between a defendant's misrepresentation and a plaintiff's injury.'" (quoting *Basic Inc. v. Levinson*, 485 U.S.

224, 243 (1988))). Because Plaintiffs cannot possibly show reasonable reliance after the withdrawal of Vioxx on September 30, 2004—as no investor could reasonably have believed that Vioxx retained *any* meaningful commercial viability after that date—Plaintiffs cannot demonstrate loss causation with respect to the alleged losses on November 1, 2004. (*See* Mem. at 29-30; Reply Mem. at 16-19.)

Third, the portion of *Schleicher* to which Plaintiffs refer actually *rejects* one of Plaintiffs' main loss causation arguments. Indeed, *Schleicher* observes that the so-called "materialization of risk" theory which Plaintiffs try to invoke with respect to the alleged corrective "disclosures" in October 2003 and September 2004 (*see* Opp. at 106) "is not a legal doctrine or anything special as a matter of fact", and "adds nothing to the analysis." *Schleicher*, 2010 U.S. App. LEXIS 17367, at *7, *8. Rather, Plaintiffs must point to a price decline sustained "when the truth [came] to light." *Id.* at *7-*8. Here, revelation of such "truth" could only be a disclosure that Defendants *had not in fact held* their professed beliefs about Vioxx. Because the alleged October 2003 and September 2004 "disclosures"—according to Plaintiffs' very own Complaint—revealed *nothing* about Defendants' alleged beliefs (¶¶ 355, 359, 380), *Schleicher* only underscores that those "disclosures" could not have constituted "corrective disclosures" for loss causation purposes.

Respectfully submitted,



Robert H. Baron

Honorable Stanley R. Chesler, U.S.D.J.
United States District Court for the District of New Jersey
Martin Luther King, Jr. Federal Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

VIA ECF

Copies to:

David A.P. Brower, Esq.
Brower Piven
488 Madison Avenue, 8th Floor
New York, NY 10022

Salvatore J. Graziano, Esq.
Bernstein Litowitz Berger & Grossmann LLP
1285 Avenue of the Americas
New York, NY 10019

Mark Levine, Esq.
Stull, Stull & Brody
6 East 45th Street, 5th Floor
New York, NY 10017

Richard H. Weiss, Esq.
Milberg LLP
One Pennsylvania Plaza
New York, NY 10119

Paul B. Brickfield, Esq.
Brickfield & Donahue
70 Grand Avenue
River Edge, NJ 07661

James E. Cecchi, Esq.
Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein
5 Becker Farm Road
Roseland, NJ 07068

Alfred C. Decotiis, Esq.
Decotiis, Fitzpatrick, Cole & Wisler LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, NY 07666

William R. Stein, Esq.
Eric S. Parnes, Esq.
Hughes Hubbard & Reed LLP
1775 I Street, N.W.
Washington, D.C. 20006

Martin L. Perschetz, Esq.
Sung-Hee Suh, Esq.
William H. Gussman, Jr., Esq.
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022

VIA EMAIL PDF